

香港人權監察

HONG KONG HUMAN RIGHTS MONITOR

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Submissions to Legislative Council Panel on Constitutional Affairs on Pros and cons of the existing political structure & the implications on good governance & The executive and the legislature relationship 15 January 2005

Introduction

The Hong Kong Human Rights Monitor expresses concern on four key areas of problems in the existing political system:

1. Lack of performance legitimacy
2. Lack of representative legitimacy
3. Imbalance of legitimacy and power between LegCo and the Chief Executive
4. Violation of international human rights Covenant

I. Lack of performance legitimacy

The key problems in this area include:

1. Policy failures
2. The failure of accountability system
3. Communication problems and lack of coordination between government policy secretaries

II. Lack of representative legitimacy

1. The Chief Executive

The three key problems in this area are:

- CE is appointed by Central Government in China after being elected by Election Committee which consists of only 800 members. These 800 are selected from a few sectors without a broad base representation.
- Since CE is not chosen by the public, he/she is not bound to be accountable to the public. Therefore, it is easy for CE to fail to address to public's need and aspiration. A CE who is not popularly elected may not even have the ability and experience to understand public demands and to integrate such often divergent demands.
- A CE, who is not a key person of political party¹ cannot effectively benefit from the interest articulation and integration functions of the party.

¹ A CE cannot be a political party member under Section 31 of the Chief Executive Election Ordinance.

2. *The Legislative Council*

There are three key undemocratic elements in LegCo leading to its failure to reflect public opinion effectively. The existence of functional constituencies, the separate voting system and the undue restrictive constraints on private members' bills and motions by LegCo Members has severely undermined the representative legitimacy of LegCo. These undemocratic elements paralyze the function of legislature as a representative body.

a. *Functional constituencies (FCs)*

- Small electorate: less than 20 million people can vote in functional constituencies. Many people are under-represented or even unrepresented. The FCs mainly protect sectoral interests.
- Corporate voting: The electorate is even more limited because corporate voters are used in the election. Since many people are excluded, FC is devalued into an obstacle to realizing public views into policies.
- FC's voting behaviour of vetoing motions which represent the public
 - "There is a high incidence (84.4% on political issue and 76.1% on economic issue) with which [Geographical Representatives (GRs)] motions are opposed by [Functional Constituency Representatives (FRs)], and to the extent that GRs are representatives of the public, it is apparent that facilitating the articulation of public opinion is not FR's primary concern."²
 - However, "it is noteworthy that when the GRs disagree with the government legislative initiatives and move motions to amend those initiatives, the FRs in effect enable the passage of government motions when they oppose GR amendments (75.5% on political issues and 90.5% on economic issues)"³

b. *Separate voting mechanism*⁴

- Undue restrictions are imposed to the procedures in respect of bills and motions introduced by LegCo Members. Among them, separate voting mechanism is the worst one. It is used when it comes to private members' bills or motions. And in many circumstances, it blocks the passage of bills or motions even though the functional constituencies veto votes are in minority. The example will be that even though 38 votes are for imposing a minimum wage system, the motion was still voted down because 16 FC Members vote against it. This sacrifices the public interests for the sake of a few. This mechanism undermines even the mere expression of opinion in motions which are not legally binding.⁵

c. *Undue restrictions on Private Members Bills*

- LegCo Members can only introduce bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council. The written consent of the Chief Executive shall be required before bills relating to government policies are introduced.

² Kwok, Rowena (2004) *Constitutional Review and Democratic Development the Way Forward— Functional Constituencies: Where to now? "The Voting Behavior of Functional Representatives"*, HKU

³ Ibid, 2004

⁴ Annex II of the Basic Law (Method for the Formation of the Legislative Council of the Hong Kong Special Administrative Region and Its Voting Procedures) provides, inter alia, "The passage of motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of members present: members returned by functional constituencies and those returned by geographical constituencies through direct elections and by the Election Committee."

⁵ In contrast, Annex II of the Basic Law also provides, inter alia, "The passage of bills introduced by the government shall require at least a simple majority vote of the members of the Legislative Council present."

III. Imbalance of legitimacy and power between LegCo and the Chief Executive

The undemocratic elements make LegCo very ineffective in representing the Hong Kong public and severely limited its representative legitimacy. They greatly restrict the power of LegCo. LegCo, which has at least half of its Members elected by universal and equal suffrage, is still greatly surpassed by the Chief Executive who is returned only by a small circle election. This inverse proportion of legitimacy vs. power highlights the Chief Executive's absence of public mandate.

It is ironic that the executive branch though not representative and not legitimate, is the most powerful. On the other hand, the legislative branch is comparatively more representative despite its serious inadequacies, is almost powerless. This imbalance of power and legitimacy causes great difficulties in policy making on the part of the executive branch.

IV. Violation of international human rights Covenant

The UN Human Rights Committee concludes that the electoral system in Hong Kong violates the International Covenant on Civil and Political Rights and calls for immediate steps to bring Hong Kong's political system back in line with the Covenant.⁶

Recommendations:

The Monitor proposes the following measures to overcome the problems set out above:

1. To abolish all FCs and to introduce universal suffrage to elect all LegCo Members.
2. To improve the problem of representative legitimacy of CE, we suggest that CE should be chosen by universal suffrage without discriminatory unreasonable restrictions in nomination.
3. To improve the democratic space for the development of political parties to address the problems of
 - lack of political experience of CE;
 - lack of support for the CE; and
 - poor communication and lack of coordination between policy secretaries.
4. To amend the Basic Law to remove the undue restrictions on the power to move Private Members Bill and to enable LegCo to provide more check and balance to the executive branch.

⁶ The United Nations Concluding observations of the Human Rights Committee (Hong Kong) : United Kingdom of Great Britain and Northern Ireland (09/11/95. CCPR/C/79/Add.57) states,

"19. The Committee is aware of the reservation made by the United Kingdom that article 25 does not require establishment of an elected Executive or Legislative Council. It however takes the view that once an elected Legislative Council is established, its election must conform to article 25 of the Covenant. The Committee considers that the electoral system in Hong Kong does not meet the requirements of article 25, as well as articles 2, 3 and 26 of the Covenant. It underscores in particular that only 20 of 60 seats in the Legislative Council are subject to direct popular election and that the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions. This clearly constitutes a violation of articles 2, paragraph 1, 25 (b) and 26. It is also concerned that laws depriving convicted persons of their voting rights for periods of up to 10 years may be a disproportionate restriction of the rights protected by article 25. ...

"25. The Committee recommends that immediate steps be taken to ensure that the electoral system be put in conformity with articles 21, 22 and 25 of the Covenant."